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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1576

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

DEAN COAL COMPANY, *Respondent*

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

W. R. PARTON, d/b/a PARTON COAL COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, United Mine Workers of America (called "UMW" herein), prays a Writ of Certiorari issue to review judgments of the United States Court of Appeals for the Sixth Circuit,[1] entered February 18, 1970, in the cases numbered 19,610 and 19,611, styled Dean Coal Company, plaintiff-appellee v. United Mine

[1] Called "Sixth Circuit" herein.

Workers of America, defendant-appellant, and W. R. Parton, d/b/a Parton Coal Company,[2] plaintiff-appellee v. United Mine Workers of America, affirming the judgments entered April 9, 1969 by the United States District Court for the Eastern District of Tennessee, Northern Division,[3] against United Mine Workers of America and in favor of Dean for $127,500, and in favor of Parton for $129,800 (JSA 15).[4]

A certified transcript of record in said cases, with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with this Court's rules.[5]

OPINIONS BELOW

The Sixth Circuit's opinion appears in Appendix B to this Petition (p. A 11a); and in the certified transcript of record. The opinion is not officially reported. It is unofficially reported in 62 CCH Labor Cases ¶ 10,682.

The District Court's memorandum appears in Appendix A to this Petition at p. A 1a; and in the certified Joint Appendix at pp. JSA 3-12. The memorandum is not reported.

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[2] Called "Dean" and "Parton" herein, or as "plaintiffs".

[3] Called "District Court" herein.

[4] Page references with the prefix "JSA" are to the volume of the certified record entitled Joint Supplemental Appendix, as filed in the Court of Appeals. Page references with the suffix "a" are to the volumes of the certified record entitled Joint Appendix, as filed in the Court of Appeals. References to the Appendix to this Petition are indicated by the symbol "A".

[5] These cases were consolidated for trial in the District Court, and, as noted in the Sixth Circuit's opinion, "were combined for briefing, argument and consideration" in the Sixth Circuit. Accordingly, petitioner deems it appropriate to file a single petition herein. *Stern & Gressman*, Fourth Edition, Section 6-32.

JURISDICTION

The Sixth Circuit's judgment was entered February 18, 1970. This Court's jurisdiction is invoked under 28 USCA §§ 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction of the District Court was based upon the Sherman Act (15 USCA 1 *et seq.*) and upon the theory of pendent jurisdiction, by which latter theory it was found the District Court had jurisdiction to determine alleged state law causes of action asserted by Dean and Parton.

QUESTIONS PRESENTED

1. In damage actions against a labor union subject to Section 6 of the Norris-LaGuardia Act, may liability be based upon alleged unlawful acts of individual agents in the absence of "clear proof" of union authorization thereof or union ratification of such acts after actual knowledge thereof?

2. In actions for damages under state law against a labor union based on alleged acts of violence, does the evidence suffice, under applicable law, to support the awards of compensatory damages?

STATUTE INVOLVED

The statutory provision involved is the Act of March 23, 1932, c. 90, 47 Stat. 71, Norris-LaGuardia Act, § 6, 29 USC § 106, set forth in Appendix C *infra*.

STATEMENT OF THE CASE

These are cases by two East Tennessee coal operators, Dean and Parton, against UMW, asserting that violence and threats of violence in a 1959 strike

constituted a violation of Tennessee common law entitling them to recover compensatory and punitive damages against UMW.

The cases were separately filed[6] but by agreement were consolidated for trial with six other cases and were tried without a jury. Plaintiffs primarily sought recovery under the Sherman Act, but their claims in this regard were dismissed. *Lewis* v. *Pennington,* 257 F.Supp. 815, *affirmed* 400 F.2d 806 (6th Cir. 1968), *cert. denied,* 393 U.S. 983 (1968). Judgments were granted by the District Court, however, on the pendant common law claims. Dean was awarded $101,787.41 in compensatory damages and $50,000 for punitive damages, or a total of $151,787.41. Parton was awarded $110,000 in compensatory damages and $50,000 in punitive damages, or a total of $160,000.

On appeals taken by UMW the Sixth Circuit reversed and remanded for further proceedings. *Lewis* v. *Pennington,* 400 F.2d 806. Upon remand the District Court stated it was familiar with and "intended to apply the 'clear proof' standard" in its original decision (JSA 4). The District Court thereupon reaffirmed its finding of liability but reduced the awards of damages. It entered judgment in favor of Dean for $77,500 in compensatory damages and $50,000 in

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[6] Dean filed a complaint against UMW on May 15, 1962 and asserted its common law claim in the pretrial order of May 11, 1965 (73-74a, 82a, 107a).

Parton was the defendant in a suit commenced by the Trustees of the United Mine Workers of America Welfare and Retirement Fund filed on June 13, 1958. Parton thereafter filed a cross claim against UMW on November 27, 1961 (61a). As amended by the pretrial order of May 11, 1966, he sought recovery under the common law claim here involved (99a).

Issues were joined upon UMW's denial that it had violated state law (130a).

punitive damages, or a total of $127,500. Judgment in favor of Parton was entered for $79,800 in compensatory damages and $50,000 in punitive damages, or a total of $129,800 (JSA 15). Upon appeals again taken by UMW the Sixth Circuit affirmed, *per curiam,* the District Court's judgment.

STATEMENT OF FACTS

A. The Dean Case

Dean, a corporation, commenced business in 1954 as a coal mining company. It signed UMW agreements in 1954, 1955 and 1956 but contended the agreements had not been authorized by its board and did not abide by them (589a, 592a, 611-15a). It paid its employees near the level required by the Walsh-Healey Act (599a).

On March 16, 1959, a group of miners from the nearby Straight Fork Mine, estimated from 30 to 300, and including UMW District 19 Representative Prater, came to the Dean tipple (593a). Prater informed the tipple operator they wanted to speak to the Dean employees.[7] The superintendent closed the mine and Prater, in a speech to the employees, told them of union benefits and urged them to join the union. In response, the Dean employees stated they wanted to consider the matter by themselves (686-89a, 837a, 841a, 846-47a, 870-72a, 903a, 907a, 909a, 1454-58a, 1462a, 1474-75a, 1482a).

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[7] The evidence of what Prater said to the superintendent is in dispute. In its original memorandum the District Court said, "The foreman sent for the stripping crew as ordered by the UMW representatives" (248a). Actually the Dean foreman acknowledged that Prater "asked me if I was going to knock the job off" (838a). He went on to say that more than two hours after Prater's arrival, he went to the mountain to get the men. The foreman said he told the men to quit because the truckers had been told by Prater to wait, but admitted he could have continued until normal quitting time (841-2a).

The next day a Dean employee called officers of the Straight Fork Local to meet with the Dean employees (1458a, 1484a). At the meeting thirteen Dean employees—a clear majority—signed union cards. Thereafter some of these employees informed the Dean superintendent they were going on strike for a UMW agreement (843a, 1484a).

Dean was shut down from March 16, 1959 until the first week in May, 1959, when it resumed operations with some of the same employees plus replacements for men who continued to strike (838a, 593a, 1923-24a).

Late in May a railroad trestle leading to the Dean mine was burned and an automobile occupied by Dean employees was struck by rifle fire. The employees, however, continued at work (595-96a, 839-40a). In early June unexploded dynamite was found on Dean's auger. Three employees (all strikers reemployed by Dean) testified they had been induced to place the dynamite on the auger by Representative Prater.

Later in 1959 Dean employees voted against UMW in an NLRB election from which the employees who were on strike were excluded as having been permanently replaced (616a, 1924a).[8]

Evidence of Damages. In the original judgment, Dean was awarded compensatory damages of $101,787.41, calculated by the District Court first by awarding the

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[8] Under § 9(c) (3) of the National Labor Relations Act, 29 USC § 159(c)(3), then in effect, employees on strike who were not entitled to reinstatement were not entitled to vote. The Labor-Management Reporting and Disclosure Act of 1959, § 9(c)(3), as amended, permits economic strikers not entitled to replacement to vote during the twelve-month period following the start of the strike. Act of September 14, 1959, P.L. 86-257, 86th Cong., 1st Session.

total losses sustained in 1959 and 1960, or $50,757.41, and second by awarding loss of profits for the three-year period 1958-1960 at the rate of $17,000 per year (253a).

Upon remand the District Court confined damages to the years 1959 and 1960. It again awarded the total losses sustained in 1959 and 1960, rounding the loss to $51,000, and awarded damages for loss of profits for those two years in the amount of $26,500 (JSA 6-9).

The District Court based its award on what Dean would have earned but for the strike. The District Court did not consider the impact on Dean's earnings resulting from the strike of certain Dean employees and their continued refusal to work after Dean hired replacements. Likewise the District Court did not consider the propriety of the award for 1960 losses though violence had ceased by June, 1959. Moreover, while the District Court made a precise calculation of earnings, based upon higher coal prices, it disregarded higher expenses, resulting from an increase in wage rates under the Walsh-Healey Act, shown to be equivalent to the higher coal prices (JSA 5-8).

B. The Parton Case

Parton started mining in East Tennessee in 1954. He signed UMW agreements in 1954, 1955 and 1956, but, as Dean, did not comply with them. His noncompliance resulted in this action by the United Mine Workers of America Welfare and Retirement Fund for unpaid royalties in which the Fund recovered judgment for $58,777.69 (413a).

UMW gave notice of cancellation of its wage agreements with a number of East Tennessee coal operators and these agreements thus expired in March, 1959.

Area coal miners employed by these companies ceased work. There were motorcades in which District 19 Representative Ross participated (1498a), and in addition, a group of miners, without UMW authorization, picketed for three or four days the trucks hauling coal to TVA (1496-99a, 416-17a). Parton, who had ceased work in December, 1959, because of lack of coal orders and the weather, had not been given a notice of cancellation because UMW believed he had gone out of business (1493-94a).

In this setting Parton resumed mining on a new TVA contract. On April 15, 1959, Parton's truckers commenced hauling coal from the mine to a crusher where Parton himself was working (417-18a).

When the trucks reached the crusher, a group of men from two local unions who were on strike had gathered near Parton's crusher (418a, 886a). One of these men said, "We are not going to let you haul any coal". Someone ("they") told Parton to dump the coal on the ground near the crusher (420a).

No UMW representative was present while this was going on. Representative Ross, in whose area the Parton mine was located, didn't have any advance notice that anyone was going there and did not learn of it until after it happened (1494a). The District Court found, however, that some of the men who had gone to the Parton crusher obtained gas for the trip "paid for by UMW Field Representative Ross" (244a).

In August, 1959, an NLRB election was held at Parton's mine. "Southern Labor Union" was selected as bargaining representative, and Parton resumed work. He testified that he was never able to "get back into op-

eration, production or anything on any profitable basis" and that he had to turn his equipment back to the equipment company (245a, 428-30a). He testified of a shot being fired into his bulldozer shortly after he resumed work (JSA 10). He said he couldn't get enough employees or truckers (428a). Actually, Parton produced more coal in August and September than he had in the same months in 1958. His production then fell off and no explanation of the decline is found in the record. He surrendered his equipment after the first of 1960 (444-47a).

Evidence of Damages. In the original judgment the District Court awarded Parton a total of $110,000 compensatory damages, including the entire value of the "equity" in the equipment surrendered in 1960 (253a).

Upon remand, the District Court, as in the Dean case, awarded damages for loss of profits for 1959 and 1960 for $14,800 in the aggregate and $65,000 for loss of equipment, a total of $79,800 for compensatory damages (JSA 12).

The District Court found Parton's operating and earnings experience to have been as follows (JSA 11):

Year	Tonnage	Net Profits
1954	28,189.26	$19,865.90
1955	28,047.62	12,088.14
1956	45,782.33	25,409.03
1957	39,154.70	1,633.41
1958	22,968.83	9,414.22 (Loss)
1959	10,936.55	[9]

[9] There are no earnings records for 1959.

The record is blank on the nature of Parton's TVA contracts except for some spot contracts in 1957 and 1958 and two term contracts, each at the same price, for 1958 and the other for 1959, the latter being the contract on which Parton was working when he finally went out of business.

The District Court found Parton would have made a profit in 1959 and 1960 "without the violence". It based its award of lost profits on the supposition "if" Parton doubled his production (JSA 11). The District Court allowed recovery of the equity in the equipment on the theory Parton "had lost everything after the interruption of his business in 1959" (JSA 10).

The record is also silent on whether Parton would have been able to secure any business other than the TVA contract he had in 1959. This contract called for 30,000 tons, which was more than Parton had mined except in two years, 1956 and 1957.

C. The Sixth Circuit's Opinion

In its first opinion in these cases, the Sixth Circuit based its reversal and remand on the theory it could not determine from the District Court's opinion whether Norris-LaGuardia's "clear proof" rule had been applied, and because the District Court's findings as to damages (which appeared to the Sixth Circuit as "clearly erroneous") were not supported by specific findings.

Upon remand the District Court affirmed it had in fact used the clear proof rule in its original opinion. (The District Court's original opinion is found at pages 140-253a, with the material part thereof beginning at 239a to 253a.) Without discussion of the evi-

dence, the District Court thereupon, in its second opinion, reaffirmed its findings of liability. Similarly without discussion of the evidence, the Sixth Circuit held in its opinion on the second appeal that there was sufficient evidence to support the District Court's findings on liability. On the issue of damages the Sixth Circuit said the "evidence leaves much to be desired" but that its examination of the evidence failed to disclose prejudicial error.

REASONS FOR GRANTING THE WRIT

I

The Sixth Circuit's Affirmance of the District Court's Judgments Represent an Incorrect Implementation of This Court's Interpretation of Liability of a Labor Union Under Section 6 of the Norris-LaGuardia Act

The Sixth Circuit's affirmance of the District Court's judgments conflicts with the requirements of Section 6 of the Norris-LaGuardia Act and this Court's decisions in *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395 and *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).[10]

The issue is whether evidence establishing arguendo unlawful acts of union organizers and evidence of unlawful acts of unknown individuals—without evidence of the authority of either from the union—is a basis

[10] Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, reads as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

for liability against the union under Section 6. We say Section 6—as written and construed—requires before liability may be imposed—*clear proof* that the particular act charged, or acts of that general type, had been (1) expressly authorized or (2) *necessarily* followed from a granted authority or (3) were subsequently ratified by the union after actual knowledge of its occurrence. Indeed the *Carpenters'* case holds as insufficient evidence the general authority of the agents for whose acts the labor union is sought to be charged.

In the cases at bar, the District Court did not, in either its original memorandum or its memorandum on remand, make any findings, however generously those findings may be read, that meet the requirements of Section 6. The District Court did just the opposite. The District Court (and the Sixth Circuit by its affirmance) necessarily proceeded on the theory that "clear proof" was satisfied by "clear proof" of the occurrence of an unlawful act and "clear proof" that a union field worker participated or was somehow involved therein. Neither Court considered whether the field worker was authorized to engage in the act or whether the union ratified the act after actual knowledge of it and the plaintiffs did not offer evidence on these pivotal issues. At the most the District Court found:

1. That shootings from ambush and dynamitings were perpetrated by persons unknown (244a). This is not evidence from which a finding of clear proof of UMW liability may be made. In *Gibbs* this Court rejected such evidence as a basis of liability saying that these acts were "never connected to any person or persons."

2. That Field Representative Prater induced striking Dean employees to place dynamite (which did not

explode) on the Dean auger (249a). Actually, the District Court did not so find. Rather, the District Court merely stated that employee "confessions" to that effect were made. No finding was made crediting that testimony (294a) or rejecting Prather's denials and those of the others implicated (1460-61a, 1468a, 1471a).[11] But even if the District Court had credited these "confessions", there are no findings which establish by "clear proof", or any proof, any one of the requirements of Section 6. In the first place, there is no evidence or finding that UMW "authorized" Prater to so induce the Dean employees. Secondly, while it does appear from evidence that Prater was authorized to organize employees (1453a), there is no evidence or finding that this general grant of authority "necessarily" or even inferentially, incidentally or permissively, included the authority to blow up a coal operator's equipment or commit any act of that character. And thirdly, there is no evidence that even remotely suggests that UMW ratified this alleged conduct.

3. That Field Representative Ross furnished gasoline to the men who went to the Parton mine on April 15th and caused Parton's truckers to dump coal on the ground (244a). Even disregarding plaintiffs' affirmative evidence that the gasoline was for picketing generally and not for picketing of the Parton mine, and undisputed evidence that Ross never discussed picket-

[11] The "confession" testimony of witnesses Aubrey Cook, Mit Day and Hubert Day implicates Prater. The evidence concerning this incident, however, is so contradicted by the testimony of others and is so contradicted by numerous other circumstances that it does not, we submit, constitute clear proof upon which UMW may be held liable herein.

ing of the Parton mine, still this evidence falls short of establishing liability under Section 6. The furnishing of gasoline for picketing in a lawful dispute, is not unlawful. There is no evidence in the furnishing of gasoline which constitutes evidence that Ross induced those men to stop Parton from mining. The only evidence is to the contrary (1494a). But even had Ross induced them to stop Parton, there is no evidence that Ross had been authorized by UMW to do so, or that he necessarily had that authority as a part of his job, or that such conduct had been ratified by UMW.

4. That Prater, by threats of violence, stopped the Dean operation on March 16, 1959. Initially we observe that the thrust of what Prater did was to induce the Dean employees to join the union; and this was not accomplished by violence. It was accomplished by persuasion. But even if violence had been used such evidence would not suffice under Section 6 for the same reason discussed in connection with Representative Ross above.

The evidence discussed in the four preceding paragraphs is the type of evidence upon which the Sixth Circuit affirmed the District Court's findings of liability. Its insufficiency is apparent for it expressly rests on the acts of field representatives and on persons wholly unknown, but not on their authorization by UMW. The plaintiffs recognized the error in the District Court's opinion on remand and moved the Court to amend its opinion to specifically find "clear, unequivocal and convincing proof showed that United Mine Workers of America, *itself,* authorized, ratified or participated in, those wrongful acts of violence". (Emphasis added.) The District Court however de-

clined to grant this motion holding that its intention in this regard had been expressed sufficiently in its second opinion (JSA 13-14). That opinion makes it clear that the authorization, participation and ratification on which the District Court predicated its findings of liability rested upon the acts of field representatives (JSA 4).

Plaintiffs may argue that *Gibbs* dictates a different conclusion—that *Gibbs* holds a field worker's participation in an unlawful act constitutes participation on the part of the parent union. *Gibbs* dealt with a case in which there was an absence of participation by a field worker in unlawful conduct. *Gibbs,* however, did not water down the requirements of the *Carpenters'* case, and the significance of *Carpenters* is that participation by an officer or member, in the absence of clear proof of authorization so to do, is not participation on the part of the parent union. A different analysis of the *Carpenters'* case renders that decision, as well as the will of Congress as stated in Section 6, meaningless.

The Sixth Circuit's decision herein, as well as the District Court's memoranda, manifest the difficulty the Courts have experienced in making proper application of Section 6. Indeed here the rule, and its requirements, are simply not discussed by the Sixth Circuit.

We submit that the confusion which has attended application of this rule, as well as the decision herein and the conflict in decisions noted, warrants the grant of the writ.

II

The Sixth Circuit's Approval of the Damage Awards Herein Is in Conflict With This Court's Gibbs and Pennington Decisions

The affirmance below of the damage awards to Dean and Parton conflicts with *UMW* v. *Gibbs,* 383 U.S. 715 (1966). *Gibbs* holds that state law is applicable to violent aspects of labor disputes and that remedies, including the award of damages, may be imposed under state law in such situations. It rejected, however, the concept that violence taints the entire union activities in an economic dispute. Contrarily *Gibbs* holds (383 U.S. 729) the "permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct and does not include consequences resulting from associated peaceful picketing or other union activities". The damages awarded to Dean and Parton are at odds with this principle. The awards here are not limited as required by *Gibbs* but are predicated on a theory which erroneously attributes all losses to the allegedly illegal aspects of an otherwise legal labor dispute.

The evidence shows why the awards should not stand. Uncontradicted evidence, for a prime example, establishes that most of the Dean employees went on strike and remained on strike even after Dean started hiring replacements. The refusal of the striking Dean employees to work was the main reason Dean lost money in 1959 and 1960 (594-95a, 609a) and those losses constitute the main element of the damages awarded Dean. We believe under *Gibbs,* and indeed as a hornbook proposition that "workers are privileged to cause harm to another by concerted action if the object and the means of their concerted action are proper". *Restatement of Torts,* § 775. Neither the

opinion of the District Court nor the affirming opinion of the Sixth Circuit gives recognition to this principle.

The opinions are also clearly erroneous for they permit, contrary to *UMW* v. *Pennington,* 381 U.S. 657, the recovery of losses sustained because of an increase in the Walsh-Healey minimum wage.[12] It is a mathematical certainty that both Dean and Parton had higher operating costs in 1959 and 1960 because of the Walsh-Healey increase. Those costs had been a factor in the commencement of this litigation for both companies had then asserted the right to recover substantial damages from UMW under the Sherman Act on the theory that UMW had wrongfully induced the Secretary of Labor (66a, 78a) to promulgate the wage rates in question. This theory, of course, did not survive *Pennington,* in which this Court held (381 U.S. 671) that losses resulting from the Secretary's determination should be excluded from any award of damages. Notwithstanding the certainty of proof and the allegations of Dean and Parton's complaints on the impact of Walsh-Healey costs, this factor was disregarded in the opinion below as "not a major influence" (JSA 5). This holding should not be permitted to stand for it accomplishes precisely what *Pennington* said should not be done.

Finally the damage awards should be set aside for they are not "strictly confined", as *Gibbs* requires, to the direct consequences of violence or threats of

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[12] The initial wage determination under the Walsh-Healey Act for the bituminous coal industry was made effective on contracts entered into for more than $10,000 after November 25, 1955 and established a wage of $2.245 per hour. A subsequent determination, effective September 20, 1958 increased the rate to $2.745 (Vol. 20, No. 209, Vol. 23, No. 185).

violence. There was no episode of violence at the Dean mine after June, 1959, nor was there at the Parton mine save for a shot allegedly fired at Parton by an unknown person in the fall of that year. Both Dean and Parton, however, were permitted to recover damages allegedly sustained in 1960, months, indeed more than a year, after the final episode of violence. It was said in *Gibbs*: "The fact that ripples of earlier violence may still be felt should not be permitted, and under Section 6 is not permitted, to impose such liability". The award of damages against UMW for the consequence of long prior violence, the question of responsibility aside, is violative of that principle.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the judgments as aforesaid.

Respectfully submitted,

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May, 1970

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civil Action No. 4463

DEAN COAL COMPANY

v.

UNITED MINE WORKERS OF AMERICA

Civil Action No. 4998

W. R. PARTON, d/b/a PARTON COAL COMPANY

v.

UNITED MINE WORKERS OF AMERICA

Memorandum

These cases were remanded to this Court by the Sixth Circuit for the further determination of the degree of proof required in support of Dean's and Parton's contentions to entitle them to recover and whether or not this Court applied the standard of proof provided for under Section 6 of the Norris-La Guardia Act (29 U.S.C. § 106) as interpreted in *United Mine Workers of America* v. *Gibbs*, 383 U. S. 715.

In the *Gibbs* case the Supreme Court, speaking through Mr. Justice Brennan stated, in effect, that before a union may be held liable in a labor dispute the proof must clearly show that a union representative actually participated in the wrongful acts, or gave prior authorization for such acts or ratified them after actual knowledge of their commission.

This Court intended to apply the "clear proof" standard in its findings and conclusions contained in its original memorandum. We were familiar with that standard at the time the cases were tried. We now reaffirm our original findings that clear proof established that the defendant, United Mine Workers of America, through its field representatives authorized, participated in, or ratified the wrongful acts of violence set out in this Court's original memorandum and that those acts of violence were the proximate cause of damage to plaintiffs Parton and Dean.

Plaintiffs entered the coal mining business in East Tennessee in 1954 with the development of the TVA Steam Plant System. The demand for coal in Eastern Tennessee was changing from high grade domestic coal for home and industrial burning to the lower grade steam or by-product coal. This resulted in the replacement of most of the old deep mines by surface or stripping operations.

Plaintiffs were engaged in contour stripping, that is, with earth moving equipment they removed the overburden from coal outcropping and proceeded along the seam or ridge line blasting and digging out the coal and loading it in trucks for hauling to a railhead, or in some cases, all the way to the steam plant. Whether a particular seam of coal can be economically mined depends upon such natural conditions as quality, thickness, amount of overburden, adaptability of terrain for the building of haul roads and the usually increasing distance to the loading point. Weather in the months of January, February and March usually precluded profitable production in Eastern Tennessee. Equipment is another factor to be considered in determining profit-making capabilities of strip mining operators. Both plaintiffs had adequate equipment for strip mining.

Wages paid by Dean increased beginning in 1955 because of the minimum wage rates established under the Walsh-

Healey Act. The hourly wages paid by Dean were as follows:

Year	High	Low
1955	2.25	1.50
1956	2.50	2.25
1957	2.50	2.25
1958	2.50	2.25
1959	3.00	2.75

Exhibit 84 indicates that wage rates were not a major influence on the profits of Dean, probably because of the relatively small number of employees. Dean made a profit of approximately $45,000.00 in 1965, which was the year before the trial.

Dean's earnings from 1955 through 1962 were as follows:

1955	$32,407
1956	31,710
1957	17,226
1958	2,469 a loss
1959	37,531 a loss
1960	13,249 a loss
1961	1,233
1962	13,441

It is noted that Dean lost money during the years 1958, 1959 and 1960, the major sum of $37,531.00 being in 1959. Defendant contends that the loss in 1960 included the cost of moving to another location, the building of roads for use at another location, and back pay to certain employees for violation of the Walsh-Healey Act, none of which was related to violence. Dean's President Ross testified that the moving was necessitated by "so much trouble on the other side of the mountain," referring to the incidents of violence occurring in 1959. A substantial portion of the back wages were paid to guards who "worked around the clock" protecting the equipment following the violence. Joint Appendix 639.

Defendant argues that the losses sustained by Dean in 1959 were not the direct result of violence or threats of violence committed by UMW or persons authorized by UMW. Defendant correctly points out that the Court may not in any event find that losses sustained by Dean prior to March 16, 1959 were a direct consequence of unlawful acts. Dean's production in 1959 during the months of January, February and March was low as compared with 1958, a year in which Dean also sustained a loss. Defendant argues that it is reasonable to assume that a significant part of Dean's 1959 loss is attributable to that period of 1959 prior to the commencement of the labor dispute. (Ex. 142-2259a, Printed Appendix.)

The lower level of production in those early months of 1959 is not significant in assessing the lost profits caused by violence. As previously indicated those three winter months were usually periods of low production. Exhibit 142 (page 2259a, Printed Appendix) shows that production by Dean in those months was in every year a small proportion of the production achieved in the remaining months.

Defendant also contends that the fact that Dean had sustained a loss in 1958 under operating circumstances at least as favorable as those which obtained in 1959 and 1960 shows that he did not sustain damages by reason of loss of profits; that during the year 1958, prior to the dispute, Dean supplied coal to TVA under its T-16, T-17 and T-10 contracts on which Ralph Ross acknowledged that he lost money (1165a-1167a, Printed Appendix); that it appears from Exhibit 142 (2259a, Printed Appendix) that he continued to produce on the T-10 contract in January, 1959; that Dean closed his mine for the winter season in January, February and March, 1960; that the contracts on which he supplied coal in 1960 were not at a price which enable Dean to make a profit; that the significance of the price factor of the 1960 production is emphasized by rea-

son of the fact that one of these contracts continued over in 1961; that although 1961 found Dean producing far more coal than it had in previous years, it nevertheless operated on virtually a break-even basis. (Ex. 142-2259a, Printed Appendix.)

Before discovering its inadvertent error in reading Exhibit 142, defendant relied heavily on the contention that Dean continued to produce in 1959 under contract number T-10 on which it had failed to make a profit in 1958. The exhibit shows that Dean produced under T-10 in 1959 only in the month of January. Contrary to defendant's original impression, Exhibit 159 (filed in the record, but not appearing in the Printed Appendix) establishes that the production contract for 1959 was at significantly higher price and quantity levels than the contracts for 1958.

The 1958 contracts to Dean were shown by Exhibit 159 to be as follows: T-17, made December 20, 1957, for six months for 1,718 tons per week, at a price of $3.23, and subsequently evaluated as costing TVA 19.98 cents per million BTU; T-10, made June 20, 1958, for six months at 1,667 tons per week, at a price of $3.37 per ton, and subsequently evaluated as costing TVA 20.47 cents per million BTU.

T-7, the contract under which Dean operated during 1959 and part of 1960, was entered March 6, 1959, provided for purchase of 1,983 tons per week for 12 months at a price of $3.43 per ton, and was evaluated as costing TVA 21.03 cents per million BTU. Violence which was authorized, caused, or ratified by the defendant through its representatives kept Dean from filling the contract; and Exhibit 84 (page 2216a of the Printed Appendix) shows that the largest drop in Dean's tonnage occurred in 1959.

Having in mind the rule of certainty that is required to prove some damage, the Court in arriving at the damage figure adopts the defendant's views that production condi-

tions in 1958 and 1959 were comparable and that the Court should make no assessment of Ralph Ross' testimony that the losses of 1958 were primarily attributable to his heart attack in the fall of that year. Dean practically broke even in 1958. The two 1958 contracts, T-17 and T-10 average $3.30 in price. This is 13 cents per ton below what Dean would have realized in 1959 under contract T-7. At the rate of production experienced in 1958 of 87,646 tons, the extra 13 cents would amount to $11,394.00 greater income for 1959.

Further, the company had more tonnage contracted in 1959 under those higher prices than it had in 1958 under the lower prices, and the extra tons in 1959 would have been produced free of the fixed costs. The two 1958 contracts averaged 1692 tons per week. The 1959 contract averaged 1983 tons per week. This would mean 291 tons per week difference and for fifty weeks would mean 14,550 more tons in 1959. At the 13 cents per ton increased income, this would mean $1,891.00 more income in 1959, in addition to the $11,394.00, or a total of $13,285.00.

The trend of the TVA market shown at 200a of the Printed Appendix contained in the previous findings of this Court shows no reason to anticipate contracts procured by Dean in 1959 for filing in 1960 would have produced lower profits in 1960 than in 1959. In the opinion of the Court, and the Court concludes, that Dean sustained at least $26,500.00 of lost profits for these two years.

The Court further finds that Dean sustained $51,000.00 operating losses for the years 1959 and 1960, proximately caused by the defendant. In addition to the compensatory damages of $77,500.00, Dean is entitled to recover $50,000.00 punitive damages as heretofore fixed by the Court.

The Court recognizes the difficulty in determining the profits lost by Dean as a direct and proximate result of

defendant's wrongs. If the fact of damage is established, uncertainty as to the extent is not prohibited.

> ". . . It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount . . ."
>
> *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562

W. R. Parton started his business as a bulldozer operator in 1954 and ended that way in the late summer of 1959, as it was in that year that he tried unsuccessfully to resume his strip mining operations. Although his business was much smaller than Dean's, his annual profit per ton was larger than that of Dean. Detailed testimony of the wages paid by Parton is absent. His labor cost increased from year to year, but the wage increase in 1956, provided for under the Walsh-Healey Act, did not prevent him from making a profit. (Exhibits 43, 44). He lost money in 1958 as it was in that year that he moved to a new seam of coal and built access roads. His production records show that when he resumed operation in August, 1959 his production for the first two months was comparable to that of the same months in 1958. He could not get truck drivers to continue hauling after the first two months in 1959 and had to guard his equipment after working hours during that period. A bulldozer which he was operating was hit by bullets late one afternoon. The production records show a sharp decline in October and November in

comparison with 1958, the lowest in Parton's five years up to that time, and production ceased during the following month.

The defendant questions the findings of the Court that Parton lost all of his investment in equipment valued at $65,000.00, pointing out that a #44 Lima shovel and a coal crusher were traded in for other equipment. During the summer Parton borrowed money on the crusher to make payments on the other equipment, and later his sons, who operated a trucking company, paid off the note and took the crusher. The Lima shovel was traded in on a new bulldozer in the fall of the year when Parton was trying to get back into production. Parton lost everything following the interruption of his business in April, 1959. The insurance on his employment was cancelled because of the dynamite explosions which destroyed other equipment in the vicinity at the time. This made it impossible for Parton or for prospective purchasers of the equipment to negotiate new loans on the equipment. He testified that he "just did not have any coal business and lost everything" and could not even employ an accountant to help him file his income tax report.

In 1966, at the time of the trial, he had no assets and there was an unpaid judgment against him in favor of the United Mine Workers of America Welfare Fund in the amount of $58,777.59. His itemized estimate of the value of his equity in the various pieces of equipment was between $76,200.00 and $78,700.00.

His contract history is not as plainly earmarked as Dean's. The record is blank on his prices, except that in 1957 and 1958 he sold a lot of coal on TVA spot contracts at very low prices and the two term contracts that appear in the record in his name. These two term contracts, Exhibit 159, were as follows: T-9, made June 20, 1958 for six months for 1,000 tons per week (shared by Howard Coal Company) at a delivered price of $4.64, evaluated at

20.42 cents per million BTU. T-6, made January 23, 1959 for twelve months for 1,242 tons per week at the same price as T-9 (also shared by Howard Coal Company).

He testified that he could not fill out his tonnage in 1958 with contracts and he spent a good deal of time and expense that year in building access roads for his operation and repairing at a cost of $2,500.00 a county bridge that he broke. His tonnage and profits for 1954 and later years are shown (Exhibit 43, 2204a, Printed Appendix) as follows:

Year	Tons	Net Profit
1954	28,189.26	$19,865.90
1955	28,047.62	12,038.14
1956	45,782.33	25,409.03
1957	39,154.70	1,633.41
1958	22,968.83	9,414.22 loss
1959	10,936.55	
1960	no operation	90,000 (equip)
1967	no operation	no operation

He should have made profits in 1959 and 1960 without the violence. His loss in 1958 of $9,414.22 is explainable by two factors: (1) the costs of building the roads and repairing the bridge mentioned above, and (2) the reduction of his tonnage in 1958 to about half of previous production. His depreciation alone was costing around $25,000.00 per year and *if* he had gotten the contracts and doubled the 1958 production figure of 22,000 tons and produced 45,000 as he did in 1956, the extra 22,000 tons would have been produced without any charge for depreciation, or at $25,000.00 below the cost of the first 22,000 tons. He would have done at least as well as he did in 1957 when he made $1,600.00.

He sold 18,200 tons (about one-half his 1957 production) on spot contracts that only average 18.92 cents per million BTU (463a-464a, Printed Appendix). Yet he made

some money. His 1959 contract was evaluated at 20.36 cents per million BTU (Exhibit 159.) It was to last a year. A reasonable estimate would be that his 1959 profits would be above his 1957 profits. He had his roads built and he was ready to operate without any of that expense in 1959. Since the record shows half his 1957 production was evaluated at about 1½ cents per million BTU below his 1959 contract (about 37 cents per ton), if only half of his 1957 tonnage be considered, he should have made $7,400.00 more than he did in 1957, when the business operated virtually on a break-even basis.

The trend in the TVA market showed no reason to expect a lower profit in 1960.

The Court, therefore, finds that Parton's loss of expected profits in 1959 and 1960 was $14,800.00. He lost $65,000.00 in equipment. His compensatory damages, therefore, amount to $79,000.00. In addition to this sum of $79,800.00 he is entitled to recover $50,000.00 punitive damages previously assessed.

ROBT. L. TAYLOR
United States District Judge

APPENDIX B

Nos. 19610 and 19611

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEAN COAL COMPANY,
Plaintiff-Appellee,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

W. R. PARTON d/b/a W. R. PARTON COAL COMPANY,
Plaintiff-Appellee,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided February 18, 1970.

Before: EDWARDS, PECK and COMBS, Circuit Judges.

PER CURIAM. We herein once again consider issues arising out of what one judge has referred to as "a spate of litigation between coal operators in [certain] Counties, Tennessee, and United Mine Workers of America . . . resulting from labor disputes that arose in 1955 and continued intermittently through 1959." *Lewis* v. *Pennington,* 257 F. Supp. 815, 817 (E.D. Tenn. 1966). The two present cases were consolidated for trial with six others and were tried without a jury. Plaintiffs-appellees primarily sought recovery under the Sherman Act but their claims in this regard were dismissed. *Lewis* v. *Pennington, supra; aff'd,* 400 F.2d 806 (6th Cir. 1968), *cert. denied,* 393 U.S. 983 (1968). However, judgments were entered by the District Court on the common law counts but they were reversed by

this Court and the six cases were remanded for further proceedings. *Lewis* v. *Pennington, supra.* On the remand, the finding of liability was reaffirmed and judgments were entered in favor of plaintiffs-appellees for both compensatory and punitive damages. The two present appeals, which were combined for briefing, argument and consideration in this Court, were perfected from those judgments.

The two issues which are here presented concern liability and compensatory damages; no issue is raised with reference to the punitive damages allowed. With reference to the first of these issues, when these cases were last before us we stated (400 F.2d 816):

> "We are of the opinion that in this lengthy record of a protracted trial, including testimony of interference with hauling operations, verbal threats of work stoppages, the wanton discharge of firearms, the placing of a dynamite charge (albeit unexploded), distribution of gasoline in areas of frequent destruction by arson, all in a locality tense with fear and anger, evidence exists from which conspiracy to commit illegal violence could be found, and that evidence was presented upon which damages under Tennessee law could be predicated. As already indicated, however, we cannot on that record and from the District Court's opinion determine that the proper requirement as to the degree of proof was applied as to the elements essential to liability and recovery of damages in the amounts assessed. Accordingly, it is concluded that a remand for the purpose of reviewing the evidence in the light of the proper standard of proof is required.
>
> If liability is established upon remand, either by reexamination of the evidence in light of the proper standard or by confirmation that such standard had in fact been applied in the first instance, an award of damages attributable to the UMW's violence would of course be proper."

Upon remand, and responsive particularly to the last sentence just above quoted, in his extensive memorandum

opinion the District Judge stated, "This Court intended to apply the 'clear proof' standard in its findings and conclusions contained in its original memorandum. We were familiar with that standard at the time the case were tried. We now affirm our original findings that clear proof established that the defendant, . . . through its field representatives authorized, participated in, or ratified the wrongful acts of violence set out in this Court's original memorandum and that those acts of violence were the proximate cause of damage to plaintiffs Parton and Dean." A reexamination of the record satisfies us that there is sufficient evidence in the record to support Judge Taylor's determination that the issues resolved were established by the proper quantum of evidence.

Turning to the question of compensatory damages, we frankly observe that the evidence supporting the damage claims leaves much to be desired. On the other hand, it must be recognized that precision of computation in the areas of these claims is by their very nature made difficult of achievement. Judge Taylor's memorandum on remand clearly demonstrates the zeal with which he approached the task of determining compensatory damages and the fact that he was conscious of the mitigating factors as well as the affirmative elements of damage to be considered. As in the case of the liability issue, our reexamination of the record and the exhibits fails to disclose prejudicial error in the method of determination. In this regard, it seems not unfair to point out that while appellant is critical of the basis of determination, no alternative standards for a reassessment of damages by this Court or for use as guidelines in the event of a further remand are offered. Similarly, it is recalled that extensive questioning from the bench during oral argument failed to elicit any suggestion as to a more definitive yardstick for either of these purposes. We are accordingly compelled to the conclusion that the District Court's allowance of compensatory damages should not be disturbed.

Affirmed.

APPENDIX C

§ 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

NO. 1576

Office-Supreme Court, U.
FILED

MAY 28 1970

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

DEAN COAL COMPANY,
Respondent.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

W. R. PARTON d/b/a PARTON COAL COMPANY,
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1576

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

DEAN COAL COMPANY,
Respondent.

UNITED MINE WORKERS OF AMERICA,
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v.

W. R. PARTON d/b/a PARTON COAL COMPANY,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

As stated in the petition, the Sixth Circuit's opinion on the second appeal appears in Appendix B to the petition,

and is in the certified transcript of record. The opinion has now been officially reported in 421 Fed. (2) 1380. However, the opinions of the lower courts on and before the first appeal are important in this case. These cases were first decided by the District Court in 1966 in *Lewis v. Pennington*, 257 F. Supp. 815, 864-870; remanded for further consideration in 400 F.2d 806, 815-818.

JURISDICTION

As stated in the petition the Sixth Circuit's judgment was entered February 18, 1970. This Court's jurisdiction was invoked by the petitioner under 28 U.S.C.A. §§ 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

As stated in the petition, jurisdiction of the District Court was based upon the Sherman Act (15 U.S.C.A. §§ 1 and 15) and upon the principle of pendent jurisdiction by which principle it was found by the District Court and the Court of Appeals that the District Court had jurisdiction to determine state law causes of action asserted by the respondents, Dean and Parton.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. IN DAMAGE ACTIONS AGAINST A NATIONAL LABOR UNION SUBJECT TO § 6 OF THE NORRIS-LeGUARDIA ACT, MAY LIABILITY BE BASED UPON UNLAWFUL ACTS OF FIELD REPRESENTATIVES AND DISTRICT OFFICERS OF THE UNION WHO ARE CLEARLY AUTHORIZED TO TAKE SUCH STEPS AS WERE NEC-

ESSARY, INCLUDING VIOLENCE AND THREATS OF VIOLENCE, TO OBTAIN SIGNATURES OF THE SMALLER COAL COMPANIES UPON THE NATIONAL CONTRACT AMENDMENTS WHICH HAD PREVIOUSLY BEEN NEGOTIATED BETWEEN THE INTERNATIONAL UNION AND THE MAJOR COAL COMPANY ASSOCIATIONS?

2. IN ACTIONS FOR DAMAGES UNDER STATE LAW AGAINST A LABOR UNION BASED UPON ACTS OF VIOLENCE AND THREATS OF VIOLENCE, DID THE EVIDENCE SUFFICE TO SUPPORT THE AWARD OF COMPENSATORY DAMAGES?

STATUTE INVOLVED

As stated in the petition the principal statutory provision involved in these cases is Norris-LeGuardia Act, § 6 (29 U.S.C. § 106).

COUNTER-STATEMENT OF THE CASE

A. The Kind of Action.

These cases deal with claims of Parton Coal Company (Parton) and Dean Coal Company (Dean) based upon violations of Tennessee law by United Mine Workers of America (UMW), such violations consisting of engagement in violence and intimidation in getting the UMW's national contract amendment of December 1958 signed by the smaller coal companies of Tennessee in the year 1959.

These claims were asserted by these two companies as alternative claims in suits against UMW in which the principal claims were based upon alleged conspiracy with major companies to force the national contract terms on the smaller companies in violation of the Sherman Act.

These cases were combined with the cases of a number of other small Tennessee coal producers for trial without a jury in what has become known as *Second Pennington* (*Lewis v. Pennington*, 257 F. Supp. 515, affirmed 400 F. 2d 806, cert. denied 393 U.S. 98).

B. Action of the Lower Courts on the First Appeal.

These plaintiffs lost on the principal claim based upon the Sherman Antitrust Act, but they won in the District Court on the claims for violence and intimidation (239a-253a; 257 F. Supp. 864 et seq.).* The District Court awarded compensatory damages of $110,000 plus $50,000 in punitive damages to Parton, and the Court awarded $101,787.41 compensatory damages plus $50,000 punitive damages to Dean (253a; 257 F. Supp. at 870).

On the first appeal, the Court of Appeals for the Sixth Circuit sustained the action of the District Court in maintaining jurisdiction over the state causes of action even though the Sherman Antitrust claim was dismissed. The Court of Appeals said:

> "The first question is whether the District Court properly concluded that it had pendent jurisdiction of the common law action in these cases brought originally as actions arising under the Sherman Act. Even though a diversity of citizenship between the parties does not

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* In this Brief we make reference to the same records which are referred to in the Petition for Certiorari. Page references with the suffix "a" are to the volumes of the certified record entitled Joint Appendix, as filed in the Court of Appeals. Page references with the prefix "JSA" are to the volume of the certified record entitled Joint Supplemental Appendix, as filed in the Court of Appeals. References to the Appendix to the Petition are indicated by the symbol "A". (See the footnote in the Petition, page 2).

exist, a federal court has pendent jurisdiction to resolve a state law claim asserted under certain circumstances with a federal claim. Armstrong Paint & Varnish Works v. NuEnamel Corp., 305 U.S. 315, 59 S. Ct. 191, 83 L. Ed. 195 (1938); Hurn v. Oursler, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933). Such pendent jurisdiction was also found to exist in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). Therein the Supreme Court stated two of the requirements for the exercise of pendent jurisdiction to be (1) that the federal claim have 'substance' so as to confer jurisdiction of the subject matter on the court in which the action is commended and (2) that the 'state and federal claims must derive from a common nucleus of operative fact.' The UMW concedes in spite of the District Court's ultimate dismissal of Dean's and Parton's federal claims, that those claims were 'substantial' with the meaning of *Gibbs*. It strenuously challenges the existence of a 'common nucleus of operative facts,' arguing that the Sherman Act claim 'embraces so many allegations irrelevant in time and content to the state claim, that to find there is a "common nucleus of operative fact" is to destroy the practical significance of this requirement.' However, it cannot be denied that there is at the very least a significant overlapping of the facts alleged and proved under the Sherman Act and state law claims, and it cannot be said that the District Court's resolution of this issue in favor of jurisdiction was a clearly erroneous abuse of discretion." (400 Fed. (2) 815-7)

With respect to the contention of the defendant that the state law against violence and intimidation (which was the basis for these state law claims) was preempted by federal

labor law and that UMW had a federally established right to engage in strikes and picketing, the Court of Appeals said:

> "it is initially observed that the Court in United Mine Workers v. Gibbs, 383 U.S. 715 729, 86 S. Ct. 1130, 1140 (1966) held that the 'permissible scope of state remedies in this area [of violence in labor disputes] is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity.' See also Teamsters Local 20 v. Morton, 377 U.S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280 (1964). And in International Union, U.A., A. & A.I.W. v. American Metal Products, Co., Tennessee, 408 S.W. 2d 682, 707 (1964), the court held that 'plaintiff is not entitled to recover losses resulting from the exercise by the defendant Unions of their lawful right to strike.' In the case at bar, it cannot be said that the District Court, which found inter alia that the losses sustained by Dean and Parton were 'caused by violent conduct' instigated and carried out by UMW members and officials, disregarded the above presumption principles and permitted recovery for losses sustained by the Companies due to lawful union activity." (400 Fed. (2) 817)

The Court of Appeals held that there was ample evidence to support a judgment for violence and intimidation against UMW saying:

> "We are of the opinion that in this lengthy record of a protracted trial, including testimony of interference with hauling operations, verbal threats of work stoppages, the wanton discharge of firearms, the placing of dynamite charge (albeit unexploded), distribution

of gasoline in areas of frequent destruction by arson, all in a locality tense with fear and anger, evidence exists from which conspiracy to commit illegal violence could be found, and that evidence was presented upon which damages under Tennessee law could be predicated." (400 Fed. (2) 816)

However, on the first appeal the Court of Appeals was not satisfied that the District Court had applied the proper standard with respect to the burden of proof. The District Court had made it plain that it was applying Norris-LaGuardia's § 6 "clear-proof rule" as to the Sherman Act Antitrust claim, but had not specifically stated that it was applying the Norris-LaGuardia rule as to the state law causes of action. Accordingly the Court of Appeals remanded the cases to the District Court for consideration of the burden of proof saying:

"As already indicated, however, we cannot on that record and from the District Court's opinion determine that the proper requirement as to the degree of proof was applied as to the elements essential to liability and recovery of damages in the amounts assessed. Accordingly, it is concluded that a remand for the purpose of reviewing the evidence in the light of the proper standard of proof is required.

"If liability is established upon remand, either by reexamination of the evidence in light of the proper standard or by confirmation that such standard had in fact been applied in the first instance, an award of damages attributable to the UMW's violence would of course be proper." (400 Fed. (2) 816)

Also on the remand the Court of Appeals instructed the District Court to make more specific findings with respect to the amount of damages arising from violence and intimi-

dation. The Court of Appeals was particularly concerned with variations in wages and prices in the damage period and asked that the District Court make more specific its findings upon these subjects. (400 Fed. (2) 818)

C. Actions of the Lower Courts Following the Remand After the First Appeal.

As stated above, the District Court, on its first consideration of these cases, discussed the clear-proof rule and expressly applied it with respect to the antitrust claims, but had not specifically referred to it in connection with the alternative claims based upon the state law. For this reason the Court of Appeals remanded the case for further consideration of the standard of proof.

On the remand the District Court affirmed that it had applied the Norris-LaGuardia § 6 "clear-proof rule" with respect to these state law causes of action and said:

> "This Court intended to apply the "clear proof' standard in its findings and conclusions contained in its original memorandum. We were familiar with that standard at the time the cases were tried. We now reaffirm our original findings that clear proof established that the defendant, United Mine Workers of America, through its field representatives authorized, participated in, or ratified the wrongful acts of violence set out in this Court's original memorandum and that those acts of violence were the proximate cause of damage to plaintiffs Parton and Dean." (JSA 4)

The District Court, at JSA pages 4-12, goes into considerable detail in analyzing the price and wage changes affecting Dean and Parton and responded fully to the second point to be considered on the remand after the first appeal. As a result of this detailed consideration, the

District Court modified the previous judgment and entered judgment for Parton for $79,800 compensatory damages plus $50,000 punitive damages or a total of $129,800 (JSA 12). For Dean the Court entered judgment in the amount of $77,500 compensatory damages plus $50,000 punitive damages or a total of $127,500.

In a short per curiam opinion the Court of Appeals affirmed the action of the lower court taken after the remand with the comment:

> "Judge Taylor's memorandum on remand clearly demonstrates the zeal with which he approached the task of determining compensatory damages and the fact that he was conscious of the mitigating factors as well as the affirmative elements of damage to be considered."

COUNTER-STATEMENT OF FACTS

A. There is an Abundance of Evidence to Establish Liability for Violence; this Record is not like the Record in United Mine Workers v. Gibbs; this Record shows the Campaign of the International Union over a period of many years to force the National Contract Amendments upon such companies as these Plaintiffs by any means whatsoever Through District Representatives and Local Agents.

Petitioner tries hard to mold its statement of the facts into a pattern that would fit into the decision of this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715. But the two records are as different as night and day.

In *Gibbs* the evidence as to violence related to an incident that occurred only with respect to the plaintiff com-

pany and when this occurrence took place no union agent was in the vicinity but all of them were attending a district meeting in a different state. When the slight violence that appears in that record occurred the agent that covered the particular area came rushing back with orders to stop the violence.

But in this case we have the evidence before the Court of many years of efforts by the international union, through district officers and district field representatives and other local agents, to force the signing of national contract amendments upon such companies as these plaintiffs. UMW in its petition would ignore the history of custom and traditional practice of the union through its authorized representatives to obtain the contract signatures which were concededly the object of the violence in this case. UMW would confine its references to what was going on to the most direct efforts of stopping these two plaintiffs from operating and even ignore some of those efforts.

As a matter of fact this record shows that what was going on in the period of damage in this case was just one more of the episodes of UMW inspired campaigns of violence and terror, and the record thoroughly documents the campaign involving many field representatives, not only in 1959 but also in the previous campaigns.

UMW would have the Court believe that employees of these plaintiffs had no reason to fear for their lives when they stopped work, and UMW would paint a picture of men making a voluntary and uncoerced choice as to whether to work or not work. Obviously a long period of shutdown was in prospect, as experienced in previous years, when there was either a stoppage of work or violence of the most disgraceful and most reprehensible character to be suffered.

Those that stopped work had only one choice to separate themselves and their families from starvation, and that was to sign up for the small weekly handouts that the union gave to those who agreed not to work. Once one of these campaigns starts, the only choice given the men in the coal field is to stop work and accept UMW's dole, or to face extreme danger to life and limb.

Because the principal claim in these cases was that there was a conspiracy to force the UMW contracts on the whole industry, the present record contains a detailed history of the United Mine Workers and the constant effort, over a period of fifteen years, by its governing bodies and international officers, to impose the National Bituminous Coal Wage Agreement on such companies as plaintiffs. International union officers proudly told the membership that the International's campaign was progressing in spite of numerous injunctions issued by the courts across the country (819a-821a).

While the signatures were obtained for the larger companies through the membership of those companies in the several larger coal associations, the job of getting the smaller companies (like these plaintiffs) signed up was left to the UMW district representatives or field workers. These representatives had no authority to change the language of the printed contracts but they had the job of getting the signatures to the contracts and the UMW witnesses themselves testified about how the district presidents (appointed and paid by the international) gave them *full leeway* in how they would get these signatures, often obtained by the use of caravans of cars loaded with men visiting the isolated small mines (686a, 689a, 1094a-1097a).

Now, just how did these field representatives conduct themselves in getting the signatures? Or, as this Court said in *Gibbs*:

" 'The relevant question, however, is whether Gilbert or other UMW representatives were clearly shown to have endorsed violence or threats of violence as a means of settling the dispute.' " *Id.* at 741.

In the *Gibbs* case it is not at all clear from the bare facts recited just what was going on at the mines except that UMW local members claimed Gibbs was trying to bring in outside men to take jobs away from them. The larger picture was not in the *Gibbs* record, and courts can decide cases only on the basis of records duly made or on facts judicially known and noticed.

Also the burden of the recited facts in *Gibbs* is that the *one* field representative involved was not present on the one or two days of violence but was attending a district meeting in Kentucky and was sent back home to restore peace according to union testimony.

On the other hand, in the present cases there is record evidence of participation in mob activity, threats of bodily harm or solicitation of acts of property destruction by *five* field representatives, acknowledged agents of the International Union, Prater, Ross, Jones, Daniel and Maddox (317a-320a; 645a-647a; 655a-656a; 663a; 889a; 926a-927a; 1097a; 412a; 755a-758a; 837a; 848a; 869a; 905a; 423a-426a; 888a; 915a; 925a; 1499a). Only the first two testified. The testimony about all but the first two goes completely undenied.

This record has sufficient depth in time to prove the violent nature of the conduct frequently or traditionally resorted to, not just in 1959 but in earlier periods also, in order to obtain contract signatures, and UMW accepted these contracts obtained by violence along with all the others. In the drives after 1950 and before the 1959 campaign in this area, there were a number of acts of terror-

ism, brutal beatings, clubbings, and actual torture in which field representatives participated (316a-320a, 645a-647a, 655a-663a). If there is any doubt that there can be, and is, rule of coal mining areas by UMW field representatives by means of terror and fear to get contracts signed just as in this case, the testimony on the record pages just referred to must be read. It is not disputed here in this record.

The UMW got the benefits of the resulting contracts. UMW representative Les Jones threatened the plaintiff, Parton, with the "Jones boys" when he tried to avoid signing the union contract (412a). As a result the UMW Welfare Fund obtained a $58,777.69 judgment against Parton earlier in this litigation (433a), based on a contract which was extracted in this way and under which the Parton employees received not one nickel of benefits in return (413a). A contract was extracted from Pennington and Phillips, and when later a mob visited their mine and the field representative was asked why the mob had come, the representative told them they could get it fixed up by going to district headquarters and straightening out their contract affairs with the district and that is what they did (291a-292a; 307a-308a). When a mob beat him up and closed his mine for operating non-union, Alonzo Cox signed the contract with the field representative and was able to open up again (658a). Some operators, like Andrew Frost, found it impossible to operate after a visitation by the caravan without signing the UMW contract (647a).

But it was the 1959 campaign that topped all previous UMW efforts in this area. The cases which have previously come before this Court reflect this fact. It was in 1959 that UMW was seeking to impose the December, 1958 amendment to the national contract which contained the Protective Wage Clause. In 1959 the funds of the inter-

national union furnished to District 19 jumped from less than $100,000 annually to $2,473,000 in that year (691a). The UMW contracts of the operators throughout the area were cancelled and the union was seeking to get signatures to the new contract. Many refused (693a).

This drive opened with the "custom or traditional practice" of caravans containing large numbers of men (up to 85 carloads by actual count, 296a). The caravan of March 16, 1959, led by field representatives Prater and Daniel, closed the White Oak Coal Company as well as plaintiff, Dean Coal Company (755a-758a; 837a). Another field representative, Ross, also led a caravan, and in addition arranged for the payment by District 19 of gasoline required by the roving pickets (888a, 915a, 925a, 1499a). One of the roving gangs whose gasoline was thus provided for closed up Parton's mine and forced him to dump his trucks loaded with coal (418a-420a).

Reading UMW's petition, one would get the impression that there was nothing going on at all, and no reason to have any anxiety about life and limb, and that the miners were free to contemplate their economic future and make a free choice. Nothing at all is said about the matters mentioned above or that there had been anything that had gone on before that would serve to give these men a moment's bit of worry. This was the approach made by UMW at the trial. This was the nature of the testimony of field representative Prater, but not of Dean foreman, Hatmaker. Counsel tried with great insistence to get this witness and other witnesses to go along with their theory of peace and harmony but failed as is shown by the following answers to questions on cross-examination by UMW counsel.

"Q Didn't they say, 'We are going to wait until the men come off the mountain at the end of the shift and we want to talk to them'?

"A No, sir.

"Q Isn't that what they did?

"A No, sir.

"Q What time did you normally quit work?

"A 4:00—I believe around that time about 4:30 or 5:00 o'clock. We worked quite a bit of overtime then, possibly later.

"Q The men, the truck drivers, when they got there, the truck driver, they told him to wait, to do dump his load and then they sat around and waited for a long time until the men quit work and came off the mountain?

"A They sat and waited till I went up and knocked the men off, and I believe the record shows we gave them the shift for the day but I believe it was 3:30 when I knocked them off.

"Q 3:30?

"A I believe it was, before the shift was over.

"Q Are you sure of that?

"A Fairly sure.

"Q And you went up and told them to come on down?

"A Told them they had stopped us from hauling coal and there was no use staying any longer.

"Q There was nothing you could do up there after they stopped hauling coal, is that right?

"A Well, we could have worked.

"Q You could have continued on doing your normal work, couldn't you?

"A Possibly, but we was afraid of getting beat up or something.

"Q Yes, but you went up and shut them down, you said, because you couldn't haul coal. That wasn't cor-

rect, was it?

"A They said we couldn't mine or load any more coal, and we quit" (841a-842a).

UMW Representative Prater testified on cross-examination about his stopping of the operations of G & R Coal Company as he did in *Gilchrist v. UMW*, 290 F.2d 36, 38 (C.A. 6, 1961), cert. denied, 368 U.S. 875 (1961) (1467a-1468a). Witnesses Allen, Orick and Daugherty, corroborated by the witness Smith, testified as they did in *Allen v. UMW*, 319 F.2d 594 (C.A. 6, 1963), about the stopping of the hauling of non-union coal on the public highways under UMW exhortation and with the use of UMW funds (888a-889a; 916a-917a; 924a-926a; 931a-933a).

The organizing campaign was over a broad front in Tennessee and Kentucky where District 19 operates.

An injunction in the District Court of Eastern Kentucky was obtained by the National Labor Relations Board April 30, 1959, extended by order of May 4, 1959, prohibiting the United Mine Workers and its District 19 to engage in "mass picketing, blocking roads, assaulting, clubbing, overturning equipment," etc. (421a-423a).

As shown above the International officers had bragged in reports to international conventions that UMW's organizing drives were not stopped by injunctions issued by numerous courts across the country (819a-821a), and this 1959 drive was not stopped either, although it changed complexion after the injunction, and the field representatives no longer openly engaged in the caravans. The order of the day became shootings from ambush at men trying to work or haul coal and burnings and dynamitings of mining equipment (422a-426a, 490a-491a, 595a-597a, 761a-762a, 843a-844a). It was in this later period that Parton's bulldozer was shot while he was operating it (429a-430a).

The unrest and fear that prevailed in the area continued until in the beginning of 1960 Dean Coal Company moved its loading point over to the other side of the mountain seeking to find a safer place (639a).

It is in the light of such a background as this that plaintiffs produced witnesses in this case who testified that in this later period the field representative was the one who instigated the plan and arranged for them to place explosives on the mining equipment of Dean Coal Company set to go off at the approximate time as the explosion which utterly destroyed the related Double Camp Mining operation near Parton's mine (848a, 869a, 905a, 597a, 423a-426a).

There can be no doubt that the analysis of the record given in the lower court opinions is reasonable and sound and that there is ample proof to sustain the finding of liability on the part of UMW.

B. The Evidence Sufficed to Support the Awards of Compensatory Damages.

The UMW petition goes back to the contention it made on the first appeal in the lower courts, that the award of damages is for the refusal of men to work with resulting decline in production and income, and it says this allows damages for the exercise of the union's right to strike and engage in peaceful activities, again relying on the *Gibbs* case.

Conceding that the damages rest largely on decline in production and income because of mines being closed and because of depleted crews and inability to get men to mine and haul coal, still the principal question is—what caused this. What caused some of the men to turn to the small monthly UMW handouts for those who agreed not to work?

More specifically, were the acts of violence and the reign of terror over a broad area which was attributable to UMW (and which had become a part of the custom and traditional practice of UMW) a substantial cause of the unwillingness of men to show up for jobs and the resulting injury and damage?

In the petition, UMW undertakes to portray Dean Coal Company as a victim of a lengthy strike voluntarily engaged in by its employees. The petition says at page 16:

> "The refusal of the striking Dean employees to work was the main reason Dean lost money in 1959 and 1960 (594a-95a, 609a) and those losses constitute the main element of the damages awarded Dean."

We ask the Court to examine the record referred to. Pages 594a-95a, 609a give no hint of there being a voluntary strike engaged in by any of the men.

The allegations of the petition are without foundation.

The only testimony that could bear on this contention of the union is the testimony of three witnesses introduced by the plaintiff Dean who admitted placing dynamite on the Dean auger during the period of violent activities in 1959 and of the two union officials, who they swore instigated the plot, UMW Field Representative Prater and Local Union President George Cross. None other of the respondents' employees who allegedly voluntarily joined the union were brought in to testify.

The first such witness, Aubrey Cook, said that he joined the Union, after the caravan or mob came and shut the mine down, and he joined out of "fear" and for the $25 per week grocery orders given by the Union (part of the $2,473,000 sent by the UMW as the so-called "strike benefit" exchanged for agreements not to work) (847a).

His accomplice, Mitt Day, when asked why he joined the Union after the shutdown said, "Well, they shut us down and we just joined the Union" (869a). His brother and the third witness relied on by the Union to support its contention, Hubert Day, when asked the same question, said: "Well, they offered us $25 weekly meal tickets or grocery lists, whatever it was, I called them meal tickets" (904a). Many other witnesses testified about the motorcades, mobs, shootings and dynamitings, which inspired fear of the Union during the period of time these three employees of the plaintiff were members of the Union participating in its violent activities. No employee or former employee of Dean Coal Company or of any other such employer was called as a witness by UMW in support of the contention now asserted that the disorganization of the Dean working force was due to anything but shutting of the mine down by force and continued union pressure by unlawful means.

The only other contention made by UMW about the amount of damages awarded was that wage increases rather than violence and intimidation brought on the losses suffered by respondents. But the Trial Court's memorandum, in the words of the Court of Appeals, "demonstrates the zeal with which he approached the task of determining compensatory damages and the fact that he was conscious of the mitigating factors as well as the affirmative elements of damage to be considered" (Page 13a of the Appendix in the back of the petition).

We refer to the Trial Court's memorandum (pages 2a-10a of the Appendix in the back of the petition) to show that petitioner's contention about changes in wages has been fully considered and properly applied in the determination of the amount of damages.

ARGUMENT

I.

THERE WAS AMPLE EVIDENCE TO JUSTIFY THE FINDING OF UMW LIABILITY UNDER THE CLEAR-PROOF RULE.

Argument in this case might well be confined to getting the facts straight with the record after the recitations contained in the petition which give no hint of the true scope of this record. Nowhere in the petition is there any effort to put the incidents that occurred on the premises of respondents into focus with all the massive record about UMW custom and practice for years to force these national contracts on these small coal companies. We have attempted to put the record back into perspective in our counter-statement of facts above.

As to petitioner's contention that there was no "clear-proof" of UMW responsibility for what went on under Norris-LaGuardia Act Section 6, we point to the very case petitioner relies on *United Brotherhood of Carpenters v. United States*, 330 U.S. 395. There, in dealing with the "clear-proof" rule this Court said at 409-410:

> "The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages, and working conditions may well be sufficient to make the union liable. An illustrative but nonrestrictive example might be where there was knowing participation by the union in the operation of the illegal agreement after its execution. And the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union."

We have shown in our statement of facts that even the UMW representatives and district officers testified that the field representatives of UMW were given full leeway to get the contract signatures of the smaller companies (687a, 689a, 1094a-1097a), and caravans containing mobs of men were used, and beatings, whippings and other forms of torture were matters of custom and traditional practice under UMW's national organizing campaigns (819a-21a; 316a-320a; 645a-647a; 655a; 663a).

UMW took full benefit from the results of these activities. The violence and threats have been used not only to get the contract signatures (as in Parton's case (412a-3a)). but also to enforce the contracts (291a-2a; 307a-8a) and to close mines permanently if they refuse to sign (647a). Mines which have been closed by violence are allowed to reopen if they sign the contract (658a).

There can be no question of UMW's responsibility for the outrageous conduct.

The Court of Appeals was truly understating this case when it said at 400 F.2d 816:

> "We are of the opinion that in this lengthy record of a protracted trial, including testimony of interference with hauling operations, verbal threats of work stoppages, the wanton discharge of firearms, the placing of a dynamite charge (albeit unexploded), distribution of gasoline in areas of frequent destruction by arson, all in a locality tense with fear and anger, evidence exists from which conspiracy to commit illegal violence could be found, and that evidence was presented upon which damages under Tennessee law could be predicated."

II.

THE AMOUNT OF DAMAGES AWARDED CORRECTLY REFLECTS THE INJURY PROXIMATELY RESULTING FROM UMW'S VIOLENT EFFORT TO GET RESPONDENTS SIGNED UP UNDER THE UMW CONTRACT.

As to the amount of damages, UMW first argues at page 16 of the petition:

> "The refusal of the striking Dean employees to work was the main reason Dean lost money in 1959 and 1960 (594-95a, 609a) and those losses constitute the main element of the damages awarded Dean."

The idea that there was a voluntary quitting of work and strike by employees of respondent is a most imaginative argument in the light of this full record. There is no testimony from these men that would support such an explanation of their leaving work when the caravan containing the mob descended on their operation. The references to the record in the above quotation do not support that argument.

Rather the record is that these employees who quit did so by reason of fear and they signed with the union to get the weekly union dole or "meal ticket" after the mine was closed down by the union mob from an adjoining county and led by two UMW field representatives (847a; 869a; 904a).

So there is no evidence that the losses of respondents were caused by anything but the fear and dread created by UMW's violent campaign. The enormity of the assault made on the industry in this area is reflected in the sudden tremendous increase in the cost to the international union of the "meal tickets" in the district (691a).

The second argument of petitioner as to the amount of damages has to do with the increase of respondents' wages paid during the period of damage, UMW contending this was a factor that would contribute to respondents' losses which could not be attributed to the violence and intimidation, and this was one of the factors pointed out by the Court of Appeals on the first appeal and remand as needing more specific attention in the findings. The District Court gave close attention to this on the remand and its memorandum thoroughly covers this factor. We refer again to that memorandum (pages 2a-10a in the Appendix in the back of the petition) as being a complete answer to this contention.

CONCLUSION

For the foregoing reasons it is submitted that the petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1576

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

DEAN COAL COMPANY, *Respondent*

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

W. R. PARTON, d/b/a PARTON COAL COMPANY, *Respondent*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I

At pages 10, 18 and 22 of their brief respondents dispute UMW's argument that Dean employees entered upon the strike and that this refusal to work was the principal cause of Dean's losses. Respondents term this argument "imaginative" and impugn the integrity of those employees by contending they merely, and without choice, joined the union and the strike to get strike benefits.

Clear answer to respondents' contention is found in the record and in the law. The testimony of one of their

employees, Mit Day, a witness for respondents, serves to illustrate the point. On cross-examination Day testified thusly (871-2a):

> "Q. . . . . Did you want to join the United Mine Workers then or not?
> "A. At that time?
> "Q. At that time, yes, you wanted to join.
> "A. I did.
> "Q. You wanted to get the benefits of it. I assume that is what you wanted to join for, wasn't it?
> "A. Yes.
> "Q. And you did join?
> "A. Yes, sir.
> "Q. A whole group of you met and joined the next day after March 16th, the time after they came up there.
> "A. Yes, I guess it was.
> "Q. And then you got a grocery order.
> "A. Yes, I got grocery orders."

As stated in the petition (p. 6), a clear majority of Dean employees joined the union and remained on strike at the risk of their jobs, even after Dean commenced hiring replacements. They sought to vote in an NLRB election held while the strike was on, but their votes were excluded as being those of replaced strikers (1924a).

It is a little late in the day—eleven years after the fact—to contend these employees were not on strike, or that they did not remain on strike as a matter of choice while other men were going to work and taking the strikers' jobs. As stated in *NLRB* v. *Roberts Brothers* (9th Cir. 1966) 225 F.2d 58, it is "no longer proper to assume that the American employee is a craven individual afraid to stand up and express himself freely on the subject of his own welfare."

Moreover, the union was entitled to use strike benefits to persuade men to join the strike. The right is expressly confirmed by Section 20 of the Clayton Act[1] and again by Section 4 of the Norris-LaGuardia Act.[2] Payment of strike benefits was termed a "normal union function" by this Court in *United Mine Workers* v. *Gibbs,* 383 US 715, 738. Respondents' contentions, as well as the decision below, are in conflict with this principle.[3]

II

No answer is found in respondents' brief to UMW's argument on Norris-LaGuardia's Section 6, nor do respondents point to any evidence which establishes by clear proof that any person was authorized by UMW to commit the unlawful acts complained of.

Respondents argue (p. 21) that UMW field workers were given "full leeway" to organize employees and imply this included the right to use violence. Neither the pages in the record to which respondents refer (687-89a, 1094-97a), nor any other parts of the record support this implication. As stated by one of the field workers, "a field worker has a certain area assigned to him, certain number of local unions, and it is his duty to handle grievances of its members and also help with the local union affairs, also sign up any new members he can in the union, or be whatever as-

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[1] 29 USC § 52, 38 Stat. 730 (see Appendix A hereto).

[2] 29 USC § 104, 47 Stat. 70 (see Appendix A hereto).

[3] Respondents twice point (pp. 15, 22) to the funds supplied the area in 1959 by UMW. The amount was $2,473,000 (691a). What respondents fail to mention, however, is that these funds were used to provide grocery orders for striking miners in parts of Eastern Kentucky as well as Northeastern Tennessee (693a).

sistance he can to anyone who works in the mines in that area (1453a)".

To argue that such a grant of authority somehow carries with it implicit authorization to do lawless acts does violence to the plain language of Section 6, for that Act requires "clear proof" of the authority even of an officer to engage in an unlawful act.

Respondents refer to acts which allegedly occurred in 1950 and 1955 and contend therefrom that "beatings, whippings and other forms of torture" were "matters of custom and traditional practice" on UMW's part. Such custom and practice respondents argue, establishes a grant of "authority" within the meaning of Section 6, as construed in *United Brotherhood of Carpenters* v. *United States,* 330 US 395, 409-10. The argument is misplaced. *Carpenters* expressly dealt with the authority of union officers to negotiate a contract and the "custom and traditional practice" therein considered referred to that aspect of authority. The argument is without merit for an even more basic reason: During the time involved there were from 133 to 533 mines in operation in Tennessee (2283a) and from 4,507 to 8,229 men employed (2288a). In a situation of that magnitude it is neither logical nor permissible to infer authorization to commit violence from the isolated acts of a few men to which respondents refer. Waving the "bloody shirt" is not a substitute for clear proof.

It was said in *United Mine Workers* v. *Gibbs,* 383 US 715, 736, that the "driving force behind Section 6 . . . was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control." This language has

special application here. And as stated in Mr. Justice Harlan's concurring opinion in *Gibbs,* 383 US at p. 743, Section 6 is directed against "a particular type of inferential proof of authority or satisfaction unacceptable to those who framed the law." We submit it is just that type of inferential proof on which respondents have predicated their case. This judgment, therefore, should be reviewed and not permitted to stand.

III

This Court recently granted certiorari in *Ramsey, et al* v. *United Mine Workers of America,* No. 1179, O.T. 1969, an action under the Sherman Act in which the Sixth Circuit's decision involved construction and application of Section 6. The construction and application of Section 6 in the instant decision is, in our opinion, of even greater general importance to National Labor Policy than the question presented in *Ramsey.* We submit this consideration warrants review herein.

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June, 1970

APPENDIX

APPENDIX

APPENDIX A

29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52: Statutory Restriction of Injunctive Relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from,

any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.